

**STATE OF MAINE**

**DEPARTMENT OF MARINE RESOURCES**

<b>IN THE MATTER OF THE APPLICATION OF</b>	)	
<b>DAVID WELLER AND MELISSA BERRY FOR A</b>	)	<b>FINDINGS OF FACT,</b>
<b>LIMITED-PURPOSE AQUACULTURE LEASE</b>	)	<b>CONCLUSIONS OF LAW</b>
<b>LOCATED IN OLD HARBOR POND</b>	)	<b>AND DECISION</b>
<b>VINALHAVEN, KNOX COUNTY, MAINE</b>	)	

On August 27, 2002, David Weller and Melissa Berry of Vinalhaven, Maine applied for a limited-purpose (experimental) commercial type, aquaculture lease totaling 1.84 acres in the coastal waters of the State of Maine, located in Old Harbor Pond, Vinalhaven, Knox County, Maine. The applicants requested the lease for a term of three (3) years for the purpose of cultivating American oysters (Crassostrea virginica) using suspended culture techniques. The application was accepted as complete on October 16, 2002. A public hearing on this application was held on June 4, 2003 at 5:00 p.m. in Vinalhaven.

Approval of limited-purpose aquaculture leases is governed by 12 M.R.S.A. §6072-A. This statute provides that a limited-purpose lease may be granted by the Commissioner of the Department of Marine Resources (DMR) if it is determined that the project will not unreasonably interfere with the ingress and egress of riparian owners; navigation; fishing or other uses of the area, taking into consideration the number and density of aquaculture leases; the ability of the site and surrounding areas to support ecologically significant flora and fauna; or the use or enjoyment within 1,000 feet of municipally, state or federally owned beaches, parks, or docking facilities. The Commissioner must also determine that the applicant has demonstrated that there is an available source of organisms to be cultured for the lease site.

**Evidence Introduced Concerning the Nature  
and Impact of the Proposed Lease**

The evidentiary record before the Department regarding this lease application includes the Department file (Exhibit 1), including the application (Exhibit 2) and the Department site report (Exhibit 3), and the record of the June 4, 2003 public hearing. At the public hearing, testimony was given by the applicants, David Weller and Melissa Berry, and the Department's Aquaculture Environmental Coordinator, Jon Lewis.

According to the application and the testimony by the applicants, the proposed experimental lease is sought to determine the commercial viability of raising American oysters. The applicants requested a lease site totaling 1.84 acres and a lease term of three (3) years. The applicants testified that they intend to experiment with different growing techniques for oysters in the pond, including the use of upwellers, mesh bags, trays and racks.. They may also research the impact of American oysters on the environment. According to the application no more than 300 mesh bags will be used at a given time and no more than 50 bags will be floating at the surface. The bags will be tethered to haul-out lines. A maximum of 1,000 3' x 4' trays will be used at the proposed site. The majority of the trays will be stacked in a maximum of 400 4'W x 8'L x 3'D racks. According to the applicants, the maximum area of the proposed lease site that would be occupied by aquaculture equipment at any given time would be 25% of the proposed lease site. The majority of the equipment will be submerged. Pumps will be used to induce water flow and a power washer will be used to clean the oysters. The applicants testified that they will follow the standard set by the industry and will take all necessary measures to keep the noise level to a minimum. They also testified that they will try to power the washer and pumps without electricity. According to the application, cleaning and harvesting of the oysters will occur from a work float equipped with a pulley system for raising trays. The oysters would be submerged in the pond for the winter. The proposed lease site would be accessed by rowboat from Mr. Weller's property, which abuts the proposed site. According to the applicants, all seed

shellfish would be obtained from Maine hatcheries, such as Pemaquid Oyster Company or Muscongus Bay Aquaculture.

In accordance with Department regulations, Chapter 2.64(2), the applicants provided an environmental characterization of the proposed lease area. According to the application, the bottom of the proposed lease site consists of sedimentary mud with boulders and pebbles. The depths are estimated to be 2 to 10 feet at low water. The applicants testified that the tidal fluctuation is less than one foot. According to the application, a weak current flows lengthwise in the pond, approximately northwest/southeast. Resident flora and fauna consist of small minnows and estuarial grasses. According to the applicants, there will be no discharge into the water associated with the lease activities. Additionally, the applicants testified that oysters are filter feeders and may actually improve the water quality in the pond. The applicants stated that they are aware that the pond is classified as closed for the harvest of shellfish and that they will be required to grow-out the oysters for a minimum of six months at another lease or license area, unless the pond is reclassified in the future.

The applicants testified that the proposed lease activities should not interfere with navigation. They state that there is approximately 35 feet between the lease site and the closest point on the far shore in which to navigate. They testified that they measured the 35 feet by walking on the ice with a measuring tape. According to the application, the current uses of the pond are limited to occasional canoes, kayaks, iceboats, and ice-skaters. The applicants testified that they requested exclusive use of the entire 1.84 acres in order to avoid entanglement between their gear and the users of the pond. In response to a question regarding seaplane usage, the applicants stated that they were unaware that the pond was used by seaplanes. The applicants provided a written statement by Vinalhaven Harbormaster Kevin O'Hearn regarding the existing uses of the proposed lease site. Mr. O'Hearn stated that current use of Old Harbor Pond is light with only the occasional rowboat, kayak, ice-skater, or iceboat. He also stated that the pond is landlocked and therefore the pond has no navigational use or fishing activity.

The Department's Aquaculture Environmental Coordinator (AEC) conducted a site visit at the proposed lease area on December 13, 2002. The AEC created a site report summarizing the information obtained during the site visit and provided testimony regarding the site report at the public hearing. According to the report and the AEC's testimony, Old Harbor Pond is an isolated water body with few homes along the perimeter. Because the pond was frozen during the site visit, the AEC was unable to calculate water depths. According to the AEC, no moorings were observed within the area of the proposed lease site. The perimeter of the pond consists of wetland grasses and forested uplands. According to the AEC, riparian access would be unaffected by the proposed lease activities. He also indicated that there are no public facilities located within 1,000 feet of the proposed lease site.

According to the AEC, Chart #13305 depicts Old Harbor Pond with low-quality accuracy. Thus, the relationship of the proposed lease site to the pond as depicted on the chart in the site report is not exact. The AEC testified that he was unable to measure the distance between the proposed lease site and the eastern shore of the pond. Due to this uncertainty, the AEC recommended that a corridor be maintained in the lease area for navigation of the small non-powered vessels that traverse the pond. The AEC testified that the nearest aquaculture lease is located on North Haven Island, approximately 7.75 nautical miles from the proposed lease site.

According to the AEC's report the proposed lease is located in an area classified as closed for the harvest of shellfish by the Department's Water Quality Division. Also, according to the report the proposed lease site is not located in an "Essential or Significant Wildlife Habitat" regulated by the Department of Inland Fisheries and Wildlife (IF&W).

Several members of the public were present at the hearing and did ask questions of the Department and the applicants. However, no members of the public offered direct testimony at the hearing.

### **Findings of Fact**

The proposed lease is located in Old Harbor Pond and abuts David Weller's property on one side and extends across the width of the pond, almost reaching the eastern shore. Access to the proposed lease would be by rowboat from Mr. Weller's abutting property. There are no docks or moorings located in the area of the proposed lease site. The perimeter of the pond consists of wetland grasses and forested uplands. The riparian land that will be used to access the site is owned by the applicant, David Weller. Based on this evidence, I find that the lease will not unreasonably interfere with the ingress and egress of riparian owners.

The proposed lease is located in water depths of approximately 2-10 feet at low water. The lease site abuts the applicant's property on one side and is approximately 35 feet from the shore on the eastern side. The applicants calculated the approximate distance of 35 feet between the lease area and the closest point on the eastern shore by walking on the ice from the lease area to the shore with a measuring tape. The approximated distance is therefore not exact or certain. Due to the inaccuracy of the nautical chart of the pond and the AEC's inability to obtain the exact distance between the lease area and the far shore of the pond, I find that some restrictions on the use of the eastern portion of the proposed lease site are required in order to maintain an adequate navigational corridor through the lease site. I find that the lease boundaries may remain the same, however, only submerged gear may be used within 100 feet of the eastern boundary. The submerged gear in this area may not be any higher than 3 feet below the surface of the pond at mean low water. The eastern 100 feet of the lease area is defined as 100 feet from corner 5 toward corner 6 (as depicted in the Department's site report), and 100 feet from corner 4 toward corner 3, and a straight line between the two points. Navigation will be allowed on all open areas of the lease site. Based on the foregoing, I find that the proposed lease will not unreasonably interfere with navigation, as long as the eastern 100 feet of the proposed lease site does not contain any floating gear and only contains submerged gear that will be a minimum of three feet below the surface at mean low water.

There is no indication of any fishing activity on the pond. The nearest existing aquaculture lease is located 7.75 nautical miles from the proposed lease site. The area of the

proposed lease is classified as “closed” for the harvest of shellfish. I find that the proposed lease will not unreasonably interfere with fishing or other uses of the area.

The bottom of the proposed lease site consists of sedimentary mud and boulders. The current flow is weak and runs in a northwest/southeast direction. American oysters are filter feeders and therefore no feed or other pollutants will be discharged into the water at the proposed lease site. Based on this evidence, I find that the proposed activities will not unreasonably interfere with the ability of the site and surrounding areas to support existing ecologically significant flora and fauna.

All seed shellfish will be obtained from Maine hatcheries, such as Pemaquid Oyster Company or Muscongus Bay Aquaculture. Based on this evidence, I find that there is an available source of American oysters.

The proposed lease site is not located within 1,000 feet of any public beaches, parks or docking facilities. Based on this evidence, I find that the proposed lease site activities will not unreasonably interfere with public use or enjoyment within 1,000 feet of any municipally, state, or federally owned beaches, parks, or docking facilities.

### **Conclusions of Law**

Based on the above findings, I conclude that:

1. The aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner;
2. The aquaculture activities proposed for this site will not unreasonably interfere with navigation, as long as the eastern 100 feet of the proposed lease site contains only submerged gear that will be a minimum of three feet below the surface at mean low water;
3. The aquaculture activities proposed for this site will not unreasonably interfere with fishing or other uses of the area, taking into consideration the number and density of aquaculture leases in the area;
4. The aquaculture activities proposed for this site will not unreasonably interfere with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna;

5. The applicant has demonstrated that there is an available source of American oysters to be cultured for the lease site; and
6. The aquaculture activities proposed for this site will not unreasonably interfere with public use or enjoyment within 1,000 feet of municipally, state or federally owned beaches, parks, or docking facilities.

Accordingly, the evidence in the record supports a finding that the proposed aquaculture activities meet the requirements for the granting of an aquaculture lease set forth in 12 M.R.S.A. §6072-A.

### **Decision**

Based on the foregoing, the Commissioner grants the requested limited-purpose commercial lease of 1.84 acres to the applicants from the date of this decision for the purpose of cultivating American oysters (*Crassostrea virginica*) using suspended culture techniques. The applicants shall pay the State of Maine rent in the amount of \$50.00 per acre per year. The applicants shall post a bond or establish an escrow in the amount of \$1,500 if the total square footage of all structures on the lease is less than or equal to 400 square feet or \$5,000 if the total square footage of all structures on the lease is greater than 400 square feet. A limited-purpose lease for commercial aquaculture research and development conveys only those rights specified in the lease.

### **Conditions to be Imposed on Lease**

The Commissioner may establish conditions that govern the use of the lease area and impose limitations on aquaculture activities. Conditions are designed to encourage the greatest multiple, compatible uses of the lease area, while preserving the exclusive rights of the lessee to the extent necessary to carry out the purposes of the aquaculture law.

The following conditions are placed on this lease:

1. navigation is allowed on the open areas of the lease;

2. all marking shall be in accordance with U.S. Coast Guard and Department of Marine Resources requirements; and
3. no floating gear is allowed in the eastern 100 feet of the lease area; only submerged gear that is a minimum of 3 feet below the surface at mean low water may be placed in the eastern 100 feet of the lease area.

The Commissioner may commence revocation procedures if he determines that substantial aquaculture has not been conducted within the preceding year or that the lease activities are substantially injurious to marine organisms. If any of the conditions or requirements imposed in this decision, in the lease, or in the law are not being observed, the Commissioner may revoke the aquaculture lease.

**Dated:** \_\_\_\_\_

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**George D. Lapointe (Commissioner)**  
**Department of Marine Resources**